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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 SARAH DIXON,

Case No. 2:15-cv-01359-JAD-PAL

8 Plaintiff,

ORDER

9 v.

(Mot Strike – ECF No. 101)

10 LEGACY TRANSPORTATION SYSTEMS,
11 LLC, et al.,

12 Defendants.

13 Before the court is Defendants’/Third-Party Plaintiffs’ Motion to Strike Dr. Kathleen D.
14 Smith Hamilton’s Supplemental Report; or, Alternatively, for Further Relief and Sanctions (ECF
15 No. 101). The court has reviewed the motion, and Plaintiff’s Opposition (ECF No. 107). No reply
16 was filed and the time for filing a reply has expired. The court also heard oral argument from
17 counsel at a hearing conducted September 5, 2017. Eric Dobberstein appeared on behalf of
18 plaintiff, Benjamin Carman appeared on behalf of defendant Ryan Richards, and Steven Jaffe and
19 Jason Wigg appeared for the remaining defendants.

20 **BACKGROUND**

21 This case involves an August 13, 2013 multi-vehicle collision on I-15 south of Las Vegas
22 between Jean and Primm, Nevada. Plaintiff Sarah Dixon (“Dixon”) was a passenger in a 2009
23 Mitsubishi being driven by her then-boyfriend, defendant Ryan Richards (“Richards”). Both
24 Dixon and Richards were in the United States Marine Corps at the time and returning to Camp
25 Pendleton after a trip to Las Vegas. Defendant Leoncio Angeles (“Angeles”) was driving a tractor
26 trailer leased from defendant Legacy Transportation Systems, LLC (“Legacy”). The Mitsubishi
27 and tractor trailer collided. The parties dispute who was at fault for the accident. Plaintiff claims
28 that Angeles suddenly pulled his tractor trailer into the emergency lane blocking the Mitsubishi

1 being driven by Richards as Richards was in the process of trying to merge back into freeway
2 traffic. Plaintiff claims Richards was forced out of the emergency lane to avoid hitting the tractor
3 trailer, lost control, and swerved onto the freeway striking two vehicles before ending up stopped
4 in the middle traffic lane. Plaintiff claims Angeles was cited and pled guilty to making an unsafe
5 lane change and is at fault for the accident. Legacy claims that Richards was at fault for the
6 accident because he was highly intoxicated, and driving recklessly at a high rate of speed on the
7 shoulder of the road. What is not disputed is that Dixon was airlifted from the accident to UMC
8 where she was treated for life-threatening injuries.

9 The Complaint (ECF No. 1) in this case was filed July 17, 2015. The parties requested and
10 received special scheduling review when the court approved a joint proposed Discovery Plan and
11 Scheduling Order (ECF No. 23) on October 21, 2015. The initial discovery plan and scheduling
12 order established an April 18, 2016 deadline for disclosure of experts, and a June 13, 2016 deadline
13 for completing discovery. The parties requested and received two extensions of the discovery plan
14 and scheduling order deadlines extending the deadline for disclosure of experts until May 31, 2016,
15 and later to October 21, 2016. A third stipulation to extend the deadlines was filed by the parties
16 on December 19, 2016 (ECF No. 39). At a hearing held on January 10, 2017, on their third request
17 for extension, the court was dissatisfied with the parties' discovery progress and required the
18 parties to schedule all remaining discovery and inform the court of what specific discovery was
19 still needed to be completed as well as proposed schedule for completing that discovery. *See*
20 *Minutes of Proceedings* (ECF No. 49). The court was also skeptical about defendants' claims they
21 should receive another extension of the expert disclosure deadline because they had been unable
22 to retain a trucking standard of care expert because their own client, Angeles, had not yet been
23 deposed. The parties submitted a stipulated discovery plan and proposed order which the court
24 approved extending the deadline for defendant to disclose a trucking standard of care expert until
25 February 17, 2017. However, all other initial expert disclosures were closed.

26 This litigation has become increasingly contentious, and the court has decided many, many
27 discovery disputes. It is apparent that there have been communication breakdowns among counsel
28 that have contributed to counsel imputing bad faith and ill motives to one another that have resulted

1 in an inordinate amount of motion practice on matters counsel would ordinarily work out among
2 themselves without judicial intervention.

3 DISCUSSION

4 In the current motion, defendants seek to strike Dr. Kathleen Hamilton Smith's
5 supplemental report, or alternatively, for further relief and sanctions. Dr. Smith disclosed her
6 initial report by the October 21, 2016 expert disclosure deadline. On April 4, 2017, Dr. Smith was
7 deposed. After her deposition, defendants learned that she had prepared a March 28, 2017
8 supplemental report which counsel for plaintiff served by mail March 31, 2017. Counsel for
9 Legacy indicated that, pursuant to his office procedures, his secretary sent him the report at 4:51
10 p.m. on April 4, 2017, after the conclusion of Dr. Smith's deposition. During oral argument
11 counsel for Legacy explained that office procedure is for staff to electronically scan documents
12 received and then forward them to the assigned attorneys the same day they are received.

13 Dr. Smith's supplemental report states that she reviewed plaintiff's Las Vegas treatment
14 bills and found they were reasonable and customary for this geographical area. However, although
15 she reviewed the bills submitted from the U.S. Navy for services rendered, as a civilian doctor she
16 offered no opinion regarding the Navy's billing practices. Defendants argue that this is an opinion
17 that should have been disclosed with her initial expert report on October 21, 2016. Additionally,
18 defendants assert that because her report does not contain language that she reached her opinion
19 to a reasonable degree of medical probability, and states only that she "feels" the bills are
20 reasonable and customary, the court should strike and exclude her from testifying that plaintiff's
21 Las Vegas medical billings from UMC, Mercy Air and Desert Canyon Rehab are reasonable and
22 customary for this geographic area.

23 Plaintiff opposes the motion pointing out that defendants have mounted a series of
24 challenges to plaintiff's experts rather than trying to defend the case on the merits. Counsel for
25 plaintiff acknowledges that Dr. Smith's supplemental report was served by mail on March 31,
26 2017. On April 6, 2017, defense counsel advised plaintiff's counsel that the defendants had not
27 received Dr. Smith's supplemental report before her April 4, 2017 deposition. Although counsel
28 for plaintiff finds this hard to believe, he acknowledges that defense counsel did not ask Dr. Smith

1 any question about the bills and her supplemental opinions at her deposition. During oral argument
2 counsel for plaintiff conceded that the supplemental report should not have been served by mail
3 days before the deposition. He was not the lawyer responsible for the case at that time and no
4 explanation for why the report was not emailed or sent by fax, and brought to opposing counsel's
5 attention before the April 4, 2017 deposition. He acknowledged this would have been the
6 professional thing to do. However, he represented that the associate who attended the deposition
7 and discussed the matter with opposing counsel two days later offered to allow defendants to
8 depose Dr. Smith a second time at plaintiff's expense. Counsel for plaintiff acknowledges that
9 plaintiff offered to make Dr. Smith available for a second deposition regarding her supplemental
10 report but disputes that plaintiff offered to pay for the deposition costs.

11 Counsel for plaintiff also argues that the same thing happened at the deposition of Leoncio
12 Angeles. Defendants failed to timely produce needed records before his deposition. Plaintiff spent
13 months trying to get records prior to the deposition set on November 18, 2016. The documents
14 were produced minutes before the deposition and lacked data needed to cross-examine the witness
15 making the documents virtually useless. As a result, plaintiff now had to fly to Utah to take Mr.
16 Angeles' continued deposition. Plaintiff did not file a motion over the issue, but defendants file
17 motions at every opportunity.

18 Counsel for plaintiff acknowledges that the court has discretion to exclude a supplemental
19 report under Rule 37(c)(1), but argues Legacy has clearly adopted an exclusion strategy and seeks
20 to run out the clock and then complain about information not received. Counsel for plaintiff points
21 out that his motion was not filed until nearly two months after Dr. Smith was deposed. Even if the
22 supplemental report does not meet some technical requirements of Rule 37 and Rule 26, defendants
23 have had more than sufficient time to request an extension to depose Dr. Smith a second time. Dr.
24 Smith is qualified to render the opinions provided in her supplemental report, and defendants have
25 been provided fair notice of those opinions. The court should therefore deny the motion because
26 Legacy is the victim of its own tactics and gamesmanship.

27 The court finds the opinions expressed in Dr. Smith's supplemental report should have
28 been disclosed by the deadline for filing initial disclosures. However, the supplemental opinion

1 was prepared and served before her deposition was taken. Counsel should have brought the
2 supplemental report to the attention of opposing counsel, and provided a copy before Dr. Smith's
3 April 4, 2017 deposition. The failure to timely disclose her supplement was not substantially
4 justified. However, the court finds that under the totality of the circumstances in this case
5 exclusion of Dr. Smith's supplemental report opinion is too harsh of a sanction. Counsel for
6 plaintiff offered to make Dr. Smith available for a second deposition two days later when he
7 learned opposing counsel had not received the supplemental report before the deposition. This
8 offer was made before the expiration of the discovery cutoff. Defense counsel elected to file this
9 motion to exclude nearly two months after Dr. Smith's deposition was taken rather than accept
10 plaintiff's offer with no explanation other than "defendants are entitled to hold plaintiff to her
11 burden of proof."

12 Defendants received leave and an extension of the expert disclosure deadline to retain and
13 disclose an expert on the trucking industry standard of care which plaintiff's counsel was courteous
14 enough not to oppose. The court approved the parties' fifth stipulation to extend the discovery
15 cutoff for the limited purpose of completing three depositions necessitated by a family emergency
16 of defense counsel responsible for defending the depositions. These were the depositions of
17 Defendant Angeles, his son Kevin (who was in the rig and a percipient witness at the time of the
18 accident), and Legacy's Rule 30(b)(6) designee. Plaintiff started Mr. Angeles' deposition in Salt
19 Lake City where he lives, but was unable to complete the deposition because records plaintiff's
20 counsel had been requesting for months were not produced until minutes before the deposition,
21 and were incomplete. Plaintiff's counsel did not file a motion for sanctions for the additional cost
22 of re-deposing the witness and instead worked with opposing counsel to reschedule. The
23 stipulation to take these 3 defense witnesses was filed May 23, 2017, the day before the current
24 motion was filed. From the court's perspective this motion was unnecessary. This dispute could
25 have and should have been resolved without judicial intervention by reasonable attorneys acting
26 reasonably.

27 Finally, defendants' own medical expert, Dr. Mary Ann Shannon, reviewed all of
28 plaintiff's medical records and prepared her own report by the initial expert disclosure deadline.

1 She later prepared two supplemental reports as additional information learned in discovery became
2 available. Plaintiff did not object to these supplemental reports as untimely or file motions to
3 exclude them. It is clear from Dr. Shannon's report that she received and reviewed all of plaintiff's
4 billing records. Dr. Shannon's medical review and report describes the injuries plaintiff sustained:
5 multiple chest injuries, liver laceration, spleen laceration and a displaced sacral fracture following
6 blunt trauma caused by her cars [sic] impact into vehicles..." The report also describes the
7 treatment plaintiff received as conservative and opines, *inter alia*, "Ms. Dixon successfully
8 survived with no documented residuals." Thus, Dr. Smith's supplemental report opining that the
9 medical bills are reasonable and customary for this area for care plaintiff received at UMC, Mercy
10 Air, and Desert Canyon Rehab, for what defendants' own expert describes as conservative
11 treatment, could hardly be a surprise to the defendant. If defendants genuinely dispute that the
12 bills for this conservative treatment are reasonable and customary the court will mitigate any
13 potential prejudice to the defendants for the late disclosure by allowing them to designate a rebuttal
14 expert on the subject of Dr. Smith's supplemental report.

15 Having reviewed and considered the matter,

16 **IT IS ORDERED** that;


- 17 1. Defendants'/Third-Party Plaintiffs' Motion to Strike Dr. Kathleen D. Smith
18 Hamilton's Supplemental Report; or, Alternatively, for Further Relief and Sanctions
19 (ECF No. 101) is **GRANTED in part** and **DENIED in part**.
- 20 2. The motion to strike is **DENIED**.
- 21 3. The motion for sanctions is **GRANTED** to the extent alternative sanctions in the form
22 of allowing defendants to depose Dr. Smith about her supplemental report at plaintiff's
23 expense. Specifically, plaintiff will incur the costs of Dr. Smith's deposition fee, the
24 reporter's appearance fee, an original and copy of the transcript.
- 25 4. The continued deposition is limited to a maximum of 1 hour and shall be scheduled as
26 expeditiously as possible consistent with the schedules of the witness and counsel for
27 the parties.

1 5. The defendants' oral request for leave to designate a rebuttal expert addressing Dr.
2 Smith's supplemental report is **GRANTED**, and defendants shall have 45 days from
3 Dr. Smith's deposition to serve plaintiff with a rebuttal expert report.

4 6. Counsel for the parties shall immediately meet and confer to schedule the deposition,
5 reduce the agreed upon date on which Dr. Smith is first available to a stipulation and
6 proposed order, and file it with the court.

7 7. Any request for relief not specifically addressed in this order is **DENIED**.

8 DATED this 6th day of September, 2017.

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11 PEGGY A. LEEN
12 UNITED STATES MAGISTRATE JUDGE
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